Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

82-337

No.

IN THE

Supreme Court of the United States

October Term, 1982

CAESAR FERRETTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals below erred by not ordering a new trial as a result of the refusal of the District Court below to impose sanctions on the Government's blatant and inexcusable violation of the District Court's discovery order requiring the production of vital discoverable evidence essential to petitioner's defense and a fair trial?

2. Whether the Court of Appeals below erred by not ordering a new trial as a result of the refusal of the District Court below to impose the sanctions required and mandated by the Jencks Act for the Government's non-production of an admitted and essential Jencks Statement written by the Government's principal and only witness to inculpate petitioner?

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PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Caesar Ferretti, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 15, 1982.

OPINION BELOW

No formal opinion was rendered by the Court of Appeals below. The judgment order issued by the Court of Appeals below appears in the Appendix hereto. The denial of the petition for rehearing, dated July 12, 1982, also appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 15, 1982. A timely petition for rehearing en banc was denied on July 12, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

STATUTORY PROVISIONS INVOLVED

The statute under which Petitioner was prosecuted, though nothing turns on its terms, was United States Code, Title 21:

§841. Prohibited acts A-Penalties.

(a). Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally-

(1). to manufacture,

distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2). to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

United States Code, Title 18:

§3500. Demands for production of statements and reports of witnesses.

(a). In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b). After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c). If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States

to deliver such statement for the inspection of the court in camera. Upon such delivery, the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any state-

ment is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d). If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e). The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1). a written statement made by said witness and signed or otherwise adopted or approved by him;

(2). a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3). a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(Added Sept. 2, 1957) P.L. 85-269, 71 Stat. 595; Oct. 15, 1970, P.L. 91-452, Title I, §102, 84 Stat. 926.)

STATEMENT OF THE CASE

Petitioner was indicted on February 14, 1979, in a two-count indictment: Count 1 charged him with the unlawful distribution of .59 of a gram of Methamphetamine (reduced at trial to .51 of a gram [416a]), a Schedule II, non-narcotic controlled substance on May 4, 1978; Count 2 charged him with the unlawful distribution of 27.28 grams of said substance (reduced at trial to 16.3 grams [416a]) on May 11, 1978, in violation of §841 of Title 21 of the United States Code (4a).

Petitioner was first tried on March 26-28, 1979, convicted and appealed. The Court of Appeals below vacated the conviction and sentence entered by the District Court below and remanded the case for a new trial. United States v. Ferretti, 635 F.2d 1089 (3rd Cir. 1980).

After Petitioner's pre-trial motions (for discovery and inspection [16a], for recusal of trial judge [13a] and to dismiss indictment [21a]) were ruled upon, his case proceeded to trial on March 3-6, 1981. Motions for judgment of acquital were filed at the close of the prosecution's evidence (456a) and at the close of Petitioner's evidence (539a-551a) were denied (552a). After the charge of the trial court below (632a-652a), the case was submitted to the jury which returned a verdict of guilty on both counts. Thereafter, Petitioner filed his motion for judgment of acquital or in the alternative, for a new trial (637a). On October 1, 1981, the trial judge below denied Petitioner's motions (682a). No formal opinion has been filed by the trial court below in support of its denial of Petitioner's

motion for judgment of acquital or for a new trial.

On November 10, 1981, Petitioner was sentenced to a term of four years imprisonment on Count 1 and to a consecutive term of imprisonment of four years on Count 2 to be followed by a term of two years on special parole (683a).

The government based its entire case on three principal witnesses: William Kean, Drug Enforcement Agent, Michael Marrazzo and chemist Maria Barba.[1]

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[1] Chemist Fanaello who testified at the first trial also testified at Petitioner's re-trial and is referred to in the Opinion of the Court of Appeals below. United States v. Ferretti, supra. 1094. Although he testified here that he analyzed government Exs. 1 and 2 (the alleged Methamphetamine) (444a-447a, 449a-450a), he was never asked by the government what his findings were either as to the composition of same or the respective weights of said Exhibits. When Petitioner sought to cross-examin him as to the substantial and inexplicable weight discrepancies existing between his findings and those of chemist Barba, the trial judge

Michael Marrazzo, who was a convicted manufacturer and distributor of huge quantities of Methamphetamine as well as other crimes (257a-258a, 261a, 264a-265a), testified that prior to May 4, 1978 (the date in Count 1 of Petitioner's indictment), he never had any dealings, drug related or otherwise, with the Petitioner (257a).

Marrazzo was paroled from imprisonment (a three-year term at Lewisburg Penitentiary for Methamphetamine offenses) on March 28, 1977, (261a, 265a, 269a). While on special parole, he once again engaged in the manufacture and sale of Methamphetamine (including a five-pound sale on one occasion and a one-pound sale on

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below sustained the government's numerous objections to this line of questioning (450a-453a).

another date) and admitted that he could have received a maximum of seventy-five years federal imprisonment for all the crimes he committed during his parole (269a-270a, 274a, 277a, 279a, 332a-333a).

Marrazzo further testified that in December of 1977 or January of 1978, after being threatened with twenty years of imprisonment by Agent Kean (who denied this) he became a paid informer for the government (266a). He was also promised immunity from prosecution for his past crimes and paid "rewards" for his information and assistance (308a-309a, 331a).

On May 4, 1978, while under surveillance by Agent Kean, Marrazzo went to Petitioner's home in broad daylight and while in Marrazzo's parked truck, Petitioner allegedly gave him .51 of a gram

of Methamphetamine without any monies being paid. Agent Kean never observed Petitioner giving Marrazzo the said minute quantity (194a). On May 11, 1978, Marrazzo, while under full surveillance of Agent Kean, again met with the Petitioner; it was a "bright and sunny day" and while on the sidewalk in front of Petitioner's home, he allegedly received from Petitioner 16.3 grams of the controlled substance in a plastic bag touched and handled by Petitioner without the payment of any money or other consideration therefor (361a, 364a-366a).

Although on May 11, 1978, Agent Kean again had Marrazzo and Petitioner at all times in his full and obstructive view while they were on the sidewalk (where the substance was allegedly transferred), he never observed the Petitioner give

anything to Marrazzo (154a-155a, 194a-196a). Although Marrazzo was trained to use a body microphone and recording equipment (and kept such equipment at his home) and had used such equipment in the past, Marrazzo had no recording equipment either on his person or in his vehicle when he met with the Petitioner on May 4 and 11, 1978 (197a-199a, 361a-362a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS AND ADDITIONALLY HAS SO FAR SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY A LOWER COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner (who had never been previously charged with a drug-related offense) was charged with the unlawful distribution of .59 of a gram of Methamphetamine (Count 1) on May 4, 1978, and 16.3 grams of said non-narcotic controlled substance on May 11, 1978, to Michael Marrazzo, a convicted felon working with the Drug Enforcement Administration. Petitioner was convicted and a new trial was ordered by the Court of Appeals below. United States v. Ferretti, 635 F.2d 1089 (3rd Cir. 1980). At his second trial, he was again convicted and appealed to the Court of Appeals below which affirmed the conviction without a formal opinion.

Government Exhibits 1 and 2 were the alleged samples of Methamphetamine received in evidence over Petitioner's objections (456a-458a). The Court of Appeals below in its opinion vacating

Petitioner's first conviction noted the "...difference between the weight recorded by [chemist] Barba, and that recorded by [chemist] Fasanello (with regard to the same substances tested)" and stated: "We are also seriously troubled by the manner in which the government authenticated the samples of Methamphetamine which served as the basis for the reports and testimony of chemist Fasanello." United States v. Ferretti, 635 F.2d 1089, 1094 (3rd Cir. 1980).

Petitioner in his motion for discovery filed pursuant to F.R.Cr.P. 16 requested (19a, ¶10), and the government subsequently agreed in writing (35a, ¶10) to supply to Petitioner all "charts and graphs" prepared by or referred to by chemist Barba when she tested the suspected Methamphetamine (Government Exhibits 1 and 2). The said agreement was incorporated into a formal order issued by the District

Court below. Throughout the trial, Petitioner's counsel repeatedly directed the District Court's attention to the government's non-compliance with said discovery order and on each occasion was assured that said charts and graphs would be produced when chemist Barba appeared to testify (73a, 80a, 107a).

Chemist Barba testified that she determined Exhibits 1 and 2 to be Methamphetamine as a result of preparing an infra red spectrum or graph from the suspected substance which graph is then compared to a standard graph or spectrum of known Methamphetamine and if the graphs are "identical", one can conclude the suspected substance is said controlled substance (404a-405a, 417a, 430a). On cross-examination, she admitted that she had no independent recollection of testing the substances in this case and was relying

solely on her notes (412a, 419a-420a). Her notes, however, disclosed that the graphs produced from Government Exhibits 1 and 2 were "similar" but not identical to the standard graphs produced by her (428a-429a). Additionally, she admitted that the graph produced from Exhibit 1 was not identical to the graph produced from Exhibit 2 which they should have been (430a-432a).

In view of said admissions from the government's chemist and further in view of the inexplicable weight discrepancy noted by the Court of Appeals below in United States v. Ferretti, supra at p. 1094, as well as the testimony of Petitioner's chemist that there was something seriously defective in the government's chemist analysis (503a-505a, 515a, 519a), it became absolutely essential for the Petitioner's counsel to cross-

examine the government's chemist with regard to her comparison of the graphs produced from Exhibits 1 and 2 with the standard graphs. Despite the government's written agreement and the District Court's order directing the production of all graphs used by or referred to by chemist Barba, the standard graphs were not brought down by the government's said witness (419a-420a). The standard graphs were left in New York City and no explanation was offered by chemist Barba or by the government for the non-production of said standard graphs other than the statement: "If they didn't bring down the standards, that is unfortunate" (423a). The objections of Petitioner's counsel with regard to the government's violation of the discovery order, his motion to strike the testimony of chemist Barba (420a-426a), the admission in evidence of

of Exhibits 1 and 2 (also objected to) (456a-458a) and Petitioner's motion for judgment of acquital (for this reason) (539a-552a), were all denied by the District Court below.

The blatant and inexcusable violation by the government of the said discovery order and its written agreement to produce the requested graphs warranted the Court of Appeals reversal and the ordering of a new trial. No hardship would have been imposed on the government or the District Court below, for the prosecution to have requested a one-day continuance of the trial for its chemist to return to New York City to secure the essential standard graphs. No such continuance was sought by the government. Fed. R. Crim. Proc. 16(d)(2) provides for the imposition of sanctions for non-compliance with

Rule 16 discovery requirements, including the prohibition from introducing evidence not disclosed. The suppression of evidence by the prosecution violates due process irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). In United States v. Augers, 427, U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976), the Supreme Court stated:

> "When the prosecutor receives a specific and relevant request [for discoverable material], the failure to make any response is seldom, if any, excusable."

The court in United States v. McCrane, 527 F.2d 906, 911 (3rd Cir. 1975) stated:

> "Under Brady v. Maryland, supra, the supression of material evidence by the government requires that a new trial be ordered regardless of good or bad faith on the part of the prosecution."

The said decision was reaffirmed in United States v. McCrane, 547 F.2d 204 (3rd Cir. 1976). In United States v. Bocra, 623 F.2d 281, 285 (3rd Cir. 1980), the court again stated:

> "When defense counsel makes an appropriate discovery request, the Government must respond by turning over the materials directly to the defendant or to the trial judge."

The inexcusable failure of the government to produce the requested graphs as agreed and as so ordered by the District Court below amounts to a willful suppression of discoverable evidence, the relevance and materiality of which is beyond dispute. If government Exhibits 1 and 2 are not Methamphetamine, the petitioner must be acquited. With the identity and authentication of said exhibits in serious dispute, it was essential and required by fundamental due process of law for the defense to be able to effectively cross-examine the government chemist as

as to her testing procedures and results secured by her. Without the production of the said standard graphs, this became impossible. The right to cross-examine is implicit in the constitutional right to confrontation. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed2d 297 (1973). The right of counsel for the accused to confront, cross-examine and impeach is cherished and remains "the principal means by which the believability of a witness and the truth of his testimony are tested." David v. Alaska, 415 U.S. 308, 316, 39 L.Ed.2d 347, 353 (1974). Additionally without the standard graphs, the chemist retained by defense counsel, who appeared and testified at the trial, could not testify as to the identity of the suspected substances (Government Exhibits 1 and 2) (501a-502a). The significance of the requested graphs becomes

even more readily apparent since the graph produced from Exhibit 1 was not identical to that graph of Exhibit 2 which graphs should have been identical if both substances were in fact Methamphetamine (503a-505a). The defense chemist further testified that the procedure employed by the government's chemist in testing the suspected substances in this case was not a proper one (515a).

Furthermore there is no evidence in the record to suggest that the requested discoverable graphs were lost or for any reason unavailable. Even if this were so, sanctions for nondisclosure based on loss of evidence should be invoked unless the government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course

of a criminal investigation; the government has the burden of making this showing and negligent failure to comply with the required procedures will provide no excuse. United States v. Bryant, 439 F.2d 642, aff'd 448 F.2d 1182 (D.C.Cir.1971). United States v. Harrison, 524 F.2d 421 (D.C.Cir.1975) was based on the decision in Bryant, supra. In United States v. Vella, 562 F.2d 275, 276 (3rd Cir. 1977), the Court of Appeals below announced the adoption of the precepts set forth in Harrison, supra. The government in this case did not assert that the discoverable graphs were in fact lost or unavailable for any reason other than the chemist neglected to bring them with her from New York City. Additionally the government made no effort to establish compliance with the requirements of United States v. Vella, supra, and United States

v. Harrison, supra.The decision of the Court of Appeals below clearly conflicts with the decisions of this Court, its own Court and the Courts of Appeals of other Circuits. It violates fundamental due process and warrants the granting of the Writ.

2. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT; THOSE OF OTHER CIRCUITS IN ITS REFUSAL TO IMPOSE SANCTIONS REQUIRED AND MANDATED BY THE JENCKS ACT FOR THE GOVERNMENT'S DESTRUCTION AND NON-PRODUCTION OF AN ESSENTIAL JENCKS STATEMENT.

The said Jencks statement was written by the Government's principal and only witness to inculpate the Petitioner. The said decision of the Court of Appeals below is an erroneous decision of an important question of general law and in conflict with the weight of authority.

Michael Marrazzo was the government's only witness to inculpate the Petitioner. It was he who allegedly received from the Petitioner a minute quantity of Methamphetamine on May 4, 1978, (.51 of a gram [416a]) and again on May 11, 1978, (16.3 grams [416a]). The government produced no other witness who allegedly saw or observed Petitioner give to Marrazzo any controlled substance or anything else.

Marrazzo at the commencement of his testimony at Petitioner's re-trial on March 3, 1981, appeared to be reading from or looking at handwritten sheets of paper (227a). Marrazzo testified that he wrote said sheets of paper approximately two weeks prior to March 3, 1981, which notes related to all of his contacts and conversations with the Petitioner and that he had no independent recollection of what occurred in

1978 without use of said sheets (283a-284a, 304a-305a). The witness was then allowed to read said sheets of notes to refresh his recollection (245a).

Michael Marrazzo further testified at Petitioner's second trial that at Petitioner's first trial (referred to in the transcript as a "prior proceeding") held in March, 1979, that he had testified similarly therein that he had no independent recollection of the events of May, 1978, (305a). He further testified at Petitioner's second trial that prior to Petitioner's first trial, he had also written three or four pages of notes setting forth all of his contacts and conversations with the Petitioner in May of 1978, and that he needed said statement to refresh his recollection <u>without which statement, he had no memory or recollection of what occurred on said dates</u> (305a). It

was further admitted that the written statement from which he testified at Petitioner's second trial was not the same written statement from which he had testified at Petitioner's first trial (284a). When asked to produce said statement written prior to Petitioner's first trial, the witness testified that he intentionally destroyed it after the trial (284a, 305a-306a, 319a). It is undisputed that this witness used said four-page handwritten statement to refresh his recollection at the prior trial (284a).

At Petitioner's first trial, when Petitioner's counsel sought to have said witness on the record describe his said four-page handwritten statement (because of the different inks and inter-delineations contained therein), he was admonished by the trial judge below who stated: "We know; we have

exhibit. You don't have to describe it." (N.T. 3/27/79, p. 171, 85a of the Appendix in the first appeal to the Court of Appeals below.

Petitioner at his second trial, pursuant to the Jencks Act, 18 U.S.C. §3500, requested the production of Marrazzo's four-page handwritten statement used by him at Petitioner's first trial (284a-285a). As a result of the admitted destruction of said Jencks statement, Petitioner moved to strike the testimony of Marrazzo (288a, 293a-297a), which motion was denied by the District Court below (303a). To compound this error, the trial court below, furthermore, at the request of the prosecutor also informed the jury that it had sustained the government's objection to the production of the Jencks statement of Marrazzo, requested by the Petitioner (327a). Petitioner also

assigned the trial court's said erroneous rulings as grounds in support of his motion for judgment of acquital as well as in his motion for a new trial--both of which were denied by the trial court below (456a, 539a-551a, 637a, 682a).

It is respectfully submitted that the Court of Appeals below erred in refusing to reverse the decision of the trial court below which refused to either strike the testimony of Michael Marrazzo or to declare a mistrial. The government concedes that the four-page handwritten statement of said witness (destroyed after Petitioner's first trial) constituted "Jencks material" (288a) within the meaning of 18 U.S.C. §3500. Jencks v. United States, 353 U.S. 657 (1956). The Act provides under subsection (d) for the striking from the

record of the testimony of the witness as the sanction for the non-production of a requested Jencks' statement. The striking of said testimony is mandatory and required by the Act.

The only excuse offered by the government for its failure to retain and preserve Marrazzo's Jencks statement was that the witness was allowed by the government to retain and destroy said statement (288a). It is undisputed that Marrazzo, a convicted felon with a horrendous record of drug dealings and convictions, was permitted to retain his Jencks statement containing his vital recorded recollections of all his contacts and communications with the Petitioner. The destruction of this statement declared an Exhibit by the trial judge below done intentionally by said felon constitutes inexcusable neglect on the part of the government to preserve

and retain a vital exhibit.

United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) imposed on the government the obligation to adopt and follow rigorous and systematic procedures designed to preserve all discoverable evidence. The good faith destruction of said statement is not an excuse for its non-production by the government. Bryant, supra, Brady v. Maryland, supra, hold that the suppression by the prosecution of any material evidence discoverable by an accused violated fundamental due process. At the conclusion of Petitioner's first trial, the government's obligation was to retain and preserve Marrazzo's Jencks statement which the witness used to refresh his recollection and without which he testified he had no independent recollection (305a). The government failed to do so and offered no excuse

or explanation for its failure to do so.

In United States v. Vella, 562 F.2d 275 (3rd Cir. 1977) the Court of Appeals below announced the adoption of the precepts set forth in United States v. Harrison, 524 F.2d 421 (D.C.Cir. 1975). In Harrison, at page 429, the court held that the duty of the government for the preservation of notes rests not only upon the Jencks Act, but also as a Brady requirement and upon Rule 16, Fed.R.Crim.Proc. United States v. Harrison, supra, was based on the decision in United States v. Bryant, supra. In United States v. Harrison, supra, the court stated at p. 427:

> "If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility."

Although the Petitioner was sub-

stantially prejudiced by the said destruction of Marrazzo's Jencks statement, it is not necessary to establish prejudice as a prerequisite for the imposition of Jencks' sanctions. Palermo v. United States, 360 U.S. 343, 353 n. 10, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287, 1296 n. 10 (1959); United States v. Bernard, 607 F.2d 1257, 1264 (9th Cir. 1979); United States v. Well, 572 F.2d 1383, 1384 (9th Cir. 1978).

Additionally, the courts have held that sanctions should be imposed for the intentional destruction of Jencks material which occurred in this case. See, United States v. Paoli, 603 F.2d 1029 (2nd Cir. 1979); United States v. Bufalino, 576 F.2d 446 (2nd Cir. 1978). The proper remedy for a violation of the Jencks Act was the reversal of the conviction in United States v. Benlizar, 459 F.Supp. 614 (D.C. 1978). The denial of a motion

to strike testimony for the loss of Jencks Act material resulted in a reversal of conviction in Lee v. United States, 368 F.2d 834 (D.C. Cir. 1966).

The testimony of government witness Marrazzo should have been stricken for the inexcusable failure of the government to comply with 18 U.S.C. §3500 as a result of the intentional destruction of vital Jencks material according to United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976); United States v. Well, supra.

In the United States v. Clark, 346 F.Supp. 428, 432 (E.D.Pa. 1972), affirmed without an Opinion in 475 F.2d 1396 (3rd Cir. 1973) the court granted a mistrial for Jencks Act violations. In United States v. Lonardo, 350 F.2d 523 (6th Cir. 1965) the conviction of the accused was reversed and the testimony of the witness was ordered stricken on the ground that

a Jencks' statement was destroyed prior to trial. In United States v. Nobles, 422 U.S. 225, 45 L.Ed.2d 141, 95 S.Ct. 2160 (1975), this Court upheld the District Court's preclusion sanction for the non-disclosure of a discoverable statement.

The failure of the District Court below to impose the mandatory preclusion sanction required by the Jencks Act and the refusal of the Court of Appeals below to reverse on this basis can not be justified. Said decision is contrary to the Jencks' statute, the holdings of this Court as well as those rulings of other Courts of Appeals. The issue involved relates to an extremely important question of general law and is in conflict with the weight of authority and warrants the granting of the Writ.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and order of the Third Circuit.

Respectfully submitted,

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DATED: August 25, 1982.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3110

UNITED STATES OF AMERICA

vs.

FERRETTI, CAESAR,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Crim. No. 79-00042)

Argued
June 15, 1982
Before: ALDISERT, GIBBONS, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the admission in evidence of government exhibits Nos. 1 and 2 as well as the district court's refusal to strike the testimony of chemist Maria Barba was

reversible error; (2) the district court's refusal to strike the testimony of the government's principal witness, Michael Marrazzo, constituted reversible error; (3) the district court erred in denying defendant's motion for discovery of D.E.A. agent Kean's personnel file without an in camera review of said file by the trial judge; (4) the district court's refusal to compel compliance by the government with its discovery order granting the defendant the right to review the personnel file of Michael Marrazzo constituted reversible error; (5) the district court's refusal to impose sanctions as a result of the intential destruction by D.E.A. agents of their handwritten surveillance notes constituted reversible error; and (6) the district court committed prejudicial error in admitted evidence intended and calculated to suggest defendant's alleged

past criminality to the jury; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: June 15, 1982.

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-3110

UNITED STATES OF AMERICA

vs.

FERRETTI, CAESAR,

Appellant

(E.D. Pa. Crim. No. 79-00042)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

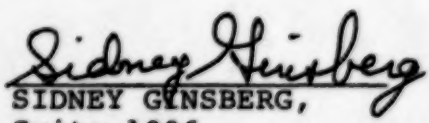
Aldisert

Judge

Dated: JUL 12 1982

CERTIFICATION OF SERVICE

I hereby certify that service of three copies of the foregoing Petition for a Writ of Certiorari was made upon the Solicitor General, Department of Justice, Washington, D.C., 20530, by Certified Mail, Return Receipt Requested, deposited in the United States Mail Box situate at 1420 Walnut Street, Philadelphia, Pennsylvania, 19102, on August 26, 1982.



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DATED: August 26, 1982.

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-337

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAESAR FERRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's inadvertent failure to produce all of the materials used in testing a substance for the presence of illegal drugs required the district court to impose sanctions under Fed. R. Crim. P. 16.

2. Whether the failure to obtain and preserve notes independently prepared by a witness for use at petitioner's first trial violates any duty of the government.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-337

CAESAR FERRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 43-45) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1982. A petition for rehearing was denied on July 12, 1982. The petition for a writ of certiorari was filed on August 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive four year terms of imprisonment and a two year special parole term. The court of appeals affirmed.

1. In March 1979 petitioner was convicted on two counts of distributing methamphetamine in violation of 21 U.S.C 841(a)(1). On appeal, the Third Circuit vacated the convictions on procedural grounds and remanded the case for a new trial. 635 F.2d 1089 (1980). Contrary to a local rule, the district court had permitted the prosecution to reply to the closing argument of the defense. See Rule 29.1, Fed. R. Crim. P. The district court mistakenly believed that the local rule had been repealed in light of Fed. R. Crim. P. 29.1.

On remand petitioner was again convicted of distributing methamphetamine in violation of 21 U.S.C. 841(a)(1). The issues petitioner raises in this Court all relate to his convictions after his second trial.

2. The underlying facts are adequately stated in the court of appeals' first opinion in this case. 635 F.2d at 1090. In early 1978 William Kean, a Drug Enforcement Administration (DEA) agent, spoke with Michael Marrazzo, who was then on parole following a conviction for manufacturing and distributing methamphetamine. Kean apparently secured Marrazzo's assistance as an informant by assuring him that he would not be prosecuted for certain crimes that Kean was aware of. See Tr. 286-290, 297, 351-353.[1] Kean and Marrazzo began an investigation of petitioner, with whom Marrazzo had associated in the past. On May 4, 1978, Marrazzo went to petitioner's home, where petitioner gave him a .59-gram sample of methamphetamine. Marrazzo delivered the sample to Kean. See Tr. 171-174, 254-264. A

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[1]"Tr." refers to the transcript of petitioner's second trial.

week later, Marrazzo met petitioner again. This time petitioner gave Marrazzo approximately an ounce of methamphetamine, for which Marrazzo agreed to pay $650. Marrazzo delivered the substance to Kean. See Tr. 174-176, 264-271.

ARGUMENT

1. Petitioner contends (Pet. 19-28) that the district court abused its discretion in declining to impose sanctions against the government pursuant to Fed. R. Crim. P. 16(d) for failure to produce the "standard" methamphetamine spectrum used in identifying the substances petitioner gave to Marrazzo. Resolution of that question necessarily depends on the particular facts of this case. Review in this Court is therefore unwarranted. In any event, petitioner's argument is without merit.

Under Fed. R. Crim. P. 16(a)(1)(D), a criminal defendant is entitled to inspect and copy the "results or reports * * * of scientific tests or experiments" that are within the control of the government and material to the defense. The rule does not, however, require production of any underlying data. Although petitioner requested production of far more than he was entitled to under Rule 16, the discovery agreement negotiated with the government and incorporated in the district court's order tracks Rule 16.[2] The "Memorandum of Areas of Agreement and Disagreement Concerning Defendant's Motion for Discovery and Inspection" provides (A. 35a) in pertinent part as follows (emphasis added):

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[2]Petitioner requested (A. 19a) production of "[a]ny and all graphs, charts, scientific treatises and other documents prepared by and/or referred to by any expert witness in the performance of any scientific tests, the results of which will or may be referred to in the testimony of any government witness."

"A." refers to the appendix filed in the court of appeals.

> [T]he government agrees to supply the *results of and any records of*, including charts and graphs, *scientific tests performed by the chemists* * * * to the extent that they are available.

The district court's discovery order did not modify the scope of the agreement on this point. See A. 37a-44a.

To identify the substances petitioner had given Marrazzo, Maria Barba, a DEA chemist, prepared an infrared spectrum for each of the substances and compared it to a "standard" infrared spectrum of methamphetamine. A. 418a-419a.[3] On the basis of these comparisons, Barba concluded that the substances petitioner had given Marrazzo contained methamphetamine. A. 405a, 409a. Barba's file in this case was turned over to petitioner (see A. 412a, 501a), but it did not include any standard methamphetamine spectrum. Because of the omission, petitioner moved (A. 424a-425a) to strike Barba's testimony and later (A. 540a-545a) moved for a judgment of acquittal on the ground that without Barba's testimony, which he claimed should have been stricken, there was insufficient evidence that the substances given to Marrazzo were methamphetamine.

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[3]The record is ambiguous as to whether Barba prepared a "standard" methamphetamine spectrum specifically for this case or used a published standard or a standard prepared in some other case. See A. 404a-405a, 409a, 419a-420a; see also A. 523a. But compare A. 497a, 522a. If Barba did not prepare a standard spectrum for this case, the published or general standard used plainly would not be subject to discovery. Cf. *United States* v. *Orzechowski*, 547 F.2d 978 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977) (discovery order does not require production of internal DEA memoranda relating to tests necessary to determine whether a substance is cocaine because the memoranda were general and not prepared in connection with any particular prosecution). It would, of course, be a proper subject for cross-examination, but that is not the issue here.

The district court reasonably declined to exercise its discretion to sanction the government pursuant to Fed. R. Crim. P. 16(d)(2) and, therefore, correctly denied both motions.[4] While an infrared spectrum may be referred to as a "graph" (see A. 416a-417a), it is doubtful that it can be fairly characterized as a result, report, or record of a scientific test, within the meaning of either Fed. R. Crim. P. 16(a)(1)(D) or the discovery agreement. Assuming that Barba prepared a standard methamphetamine spectrum, the district court could reasonably have concluded that the standard was closer to a piece of equipment or a reference work than a report or record of a test and, therefore, not subject to discovery. At the very least, the district court could have concluded that such a dubious violation of Rule 16 and the discovery agreement provided insufficient basis, under the circumstances of this case, for imposing the severe sanctions sought by petitioner.

Before petitioner's first trial, Barba moved to Germany. See 635 F.2d at 1094. For the retrial, however, Barba was brought from Germany to testify. The prosecutor asked Barba and another chemist who had analyzed the substances to bring to court "their charts and whatever results, any papers, figures and stuff that they used * * *" (A. 422a-423a). The prosecutor did not specifically ask that the chemists bring any standard methamphetamine spectrum they might have used because he was not familiar with the process used to identify methamphetamine. A. 423a. Barba

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[4]Fed. R. Crim. P. 16(d)(2) provides in pertinent part as follows: "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."

brought her file to court and, as noted, it was disclosed to petitioner.[5] Given petitioner's general and ambiguous discovery request, the prosecutor's good faith effort to comply militates against imposing sanctions for any violation of the rule or agreement. Petitioner complains (Pet. 24-25) that the government did not seek a continuance to secure the standard methamphetamine spectrum, but that course was equally available to petitioner, and he failed to suggest it.[6] Under the circumstances of this case, the court's refusal to impose sanctions was amply justified.[7]

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[5]We are advised by the former Assistant United States Attorney who tried petitioner that Barba's file was not sought or disclosed in connection with petitioner's first trial.

[6]Furthermore, it is doubtful that the failure to provide the standard prejudiced petitioner. We are advised by the former Assistant United States Attorney that no question as to any standard methamphetamine spectrum was raised at the first trial, although the standard used by the chemist who testified at that trial was not produced. Nor did petitioner ever seek access to the substances for purposes of performing his own tests. Finally, while petitioner unsuccessfully attempted to have Barba's testimony struck because of the failure to produce the standard, petitioner made no further efforts to secure the standard. Indeed, after ascertaining that Barba did not have the standard in court, petitioner made no attempt to determine whether the standard she used could be obtained. Petitioner's trial strategy therefore appears to have been based on the assumption that he would benefit more from the absence of the standard than from its presence.

[7]Nothing in either *Brady* v. *Maryland*, 373 U.S. 83 (1963), or *United States* v. *Agurs*, 427 U.S. 97 (1976), creates a presumption that information not disclosed is favorable to the defendant and material. Until the standard methamphetamine spectrum that Barba used is examined, therefore, petitioner's *Brady* claim is (at best) premature.

As petitioner acknowledges (Pet. 29), "the government * * * did not assert that the [standard methamphetamine spectrum was] * * * lost or unavailable * * *." Thus, the cases cited at Pet. 28-29 discussing the government's obligation to adopt procedures to preserve evidence are irrelevant.

2. Petitioner next contends that the district court erred in refusing to strike Marrazzo's testimony because the government failed to preserve the notes Marrazzo had used in testifying at petitioner's first trial. That claim is frivolous because (1) the government never received the notes; (2) petitioner reviewed the notes at his first trial; and (3) petitioner had the transcript of Marrazzo's testimony at the first trial available for cross-examination at the second trial.

During his testimony at the second trial, Marrazzo took out a sheet of paper (Tr. 247) to which he referred in the course of his testimony (Tr. 247, 264-265). On cross-examination, Marrazzo explained that he had written notes concerning the two 1978 drug transactions with petitioner shortly before the second trial. He also used notes during his testimony at petitioner's first trial, but he destroyed those notes at some point after petitioner's first conviction (Tr. 303-307, 308-310). At a bench conference, the government advised the court that Marrazzo had shown his notes to petitioner's attorney at the first trial. Petitioner did not request a copy of the notes at that time. The government never received a copy of the notes.

Petitioner moved to strike Marrazzo's testimony on the ground that the government's failure to produce Marrazzo's notes violated the Jencks Act. Petitioner admitted that he had seen the notes at the prior trial and remarked that there were variances between the notes Marrazzo had used at the first trial and the notes that he brought with him to the second trial. The district court correctly denied petitioner's motion (Tr. 313-323).

The prosecutor did not dispute (A. 288a) that Marrazzo's handwritten notes describing the substance of his testimony at the first trial constituted a "statement" within the meaning of the Jencks Act. Nonetheless, it is clear that the government produced all statements written by Marrazzo

that were within its possession, custody, or control. The government never had custody or control over the notes and was not obliged to obtain and preserve them for petitioner's use at any subsequent trial. See *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.), cert. denied, 449 U.S. 875 (1980) (failure to provide a transcript of a witness' testimony from a prior proceeding did not violate the Jencks Act because the transcript was available from the court and not in the prosecutor's possession, custody, or control).[8]

In any event, any error in the government's failure to obtain and preserve a copy of the notes was plainly harmless. See *United States* v. *Surface*, 624 F.2d 23, 26 (5th Cir. 1980) (harmless error where no material difference between typewritten statement and undisclosed handwritten notes).[9] Marrazzo showed his notes to petitioner's attorney at the first trial, so petitioner had an opportunity to use the notes for impeachment at that time. Moreover, petitioner used the transcript of Marrazzo's testimony at the first trial (which, of course, was based on Marrazzo's notes) for cross-examination during the retrial (see Tr. 349-351). Finally, petitioner's counsel admitted that he remembered some of the information in Marrazzo's first set of notes (see Tr. 321-322). Under these circumstances, it is clear that there was no reversible error.

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[8]For the same reason, petitioner's reliance (Pet. 37-38) on *Brady* v. *Maryland*, *supra*; *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971), and similar cases is completely misplaced. Those cases do not impose any duty on the government *to secure* evidence that might be discoverable.

[9]Contrary to petitioner's apparent contention (Pet. 38-39), Fed. R. Crim. P. 52(a) is applicable to Jencks Act violations. See *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

DECEMBER 1982

DOJ-1982-12